IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SPECIAL TERM, 1900.

EX PARTE EDWARDS.

SUBMITTED JULY 9TH, 1900. DECIDED OCTOBER 9TH, 1900.

FREAR, C.J., GALBRAITH, J., AND HUMPHREYS, CIRCUIT JUDGE, IN PLACE OF PERRY, J., ABSENT.

The Congress of the United States by a Joint Resolution, "To Provide for annexing the Hawaiian Islands to the United States," approved July 7th, A. D. 1898, provided, *inter alia*, that "the municipal legislation of the Hawaiian Islands * * * * not inconsistent with this joint resolution nor contrary to the Constitution of the United States * * * * shall remain in force until the Congress of the United States shall otherwise determine." On August 12th, A. D. 1898, there were certain ceremonial functions held in Honolulu at which the Hawaiian Government was formerly notified by the United States Minister Plenipotentiary and Envoy Extraordinary of the adoption and approval of the joint resolution aforesaid and at which the Hawaiian Government made an unequivocal transfer and cession of its sovereignty and property. Held—

(1) That by virtue of the language of the Joint Resolution above quoted all municipal legislation of the Hawaiian Islands contrary to the Constitution of the United States was *ex vi verbae* and not by implication merely, annulled and ceased to be of force or effect after the 12th day of August, A. D. 1898. The question as to whether the joint resolution took effect so as to operate as a repeal of Hawaiian municipal legislation, contrary to the Constitution of the United States, at the date of its approval or on the 12th day of August, A. D. 1898, is one not necessary to the decision of this case.

(2) No person could be put upon trial for an infamous crime in the Hawaiian Islands after August 12th, 1898, without having been first indicted by a grand jury; nor could one be convicted of such crime save by the unanimous verdict of twelve jurors.

(3) Section 616 of the Penal Laws of 1897 providing for the finding of an "indictment" by a Circuit Judge, and that part of Section 1345 of the Civil Laws of 1897 authorizing nine jurors to return a verdict in criminal cases is municipal legislation contrary to the Constitution of the United States and is null and void.

(4) Sodomy is "an infamous crime" within the meaning of the Fifth Amendment to the Constitution of the United States.

(5) The petitioner in this case having been put to his trial on the 16th day of August, A. D. 1898, upon an "indictment"—so-called, found by a circuit judge, charging him with the crime of sodomy and thereof convicted by a verdict less than unanimous, is entitled to be discharged.

OPINION OF THE COURT BY GALBRAITH, J.

(Frear, C.J., dissenting.)

This was an original proceeding on a writ of habeas corpus issued on the petition of George L. Edwards, and the return thereto.

The petitioner was charged on an indictment found by the Circuit Judge of the First Circuit, Island of Oahu, Hawaiian Islands with the offense of an attempt to commit sodomy; was tried and convicted on the 16th day of August, A. D., 1898, by the concurrence of ten of the twelve jurors, and sentenced by the court to imprisonment at hard labor for a term of five years. The return admits that he is now held in the Oahu Prison, Territory of Hawaii, under the commitment issued in pursuance of the conviction and sentence as alleged in the petition.

The indictment against the petitioner was returned under Sec. 616 of the Penal Code of 1897 of the Republic of Hawaii, which reads: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill."

The provision of the code relative to the verdict of juries reads as follows: "Sec. 1345. No jury for the trial of any case civil or criminal, shall be less than twelve in number; but when nine of the jury shall agree upon a verdict, they may render the same and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

It is contended by the petitioner that his indictment, conviction and sentence were void, and his detention is now illegal, in this that he was placed upon trial for an infamous crime without an indictment by a grand jury and was convicted by the minority verdict of a jury and thus denied the rights and privileges guaranteed him under the 5th and 6th Amendments of the Constitution of the United States.

It is contended on behalf of the Territory that the petitioner was legally convicted under the laws of the Republic of Hawaii, that no act of Congress had, at that time, extended the Constitution and laws of the United States to the Hawaiian Islands, and that these amendments, or any other parts of the Constitution of the United States, were not in force on the Hawaiian Islands, at the time of his conviction and sentence, to-wit, Aug. 16th, 1898.

In passing upon the question raised in this case we cannot overlook the history of the long and laborious struggle for the Annexation of the Hawaiian Islands to the United States, extending over a period of nearly half a century and ending with the passage of the Joint Resolution by the United States Congress and its approval by President McKinley on the 7th day of July A. D. 1898; nor forget the fact that one of the strong arguments for annexation was that American civilization had long been established in these islands and its people and institutions would easily and naturally adapt themselves to and be assimilated with American law and government.

The constitution of the Republic of Hawaii, adopted in 1894, contained this provision: "The President, with the approval of the Cabinet, is hereby expressly authorized and empowered to make a Treaty of Political or Commercial Union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate." Art. 32.

A treaty of annexation was negotiated by the Representatives of the United States and the Republic of Hawaii in February 1893, and withdrawn from the consideration of the United States Senate by the President, in March following, and another treaty was made on June 17th, 1897. This last treaty was pending before the United States Senate for ratification when the Joint Resolution was passed.

This resolution reads in part as follows:

"JOINT RESOLUTION"

TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES.

Whereas the Government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands together with every right and appurtenance thereunto appertaining; therefore,

"Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, that said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby annexed as a *part* of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America." * * * * * * "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nation. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." 30 U. S. Statutes at Large p. 750.

On the 12th day of August, A. D., 1898, four days prior to the conviction of the petitioner, the ceremonies attending the formal transfer of the sovereignty and public property of the Republic of Hawaii occurred; the Hawaiian flag was lowered from the Capitol Building and the American flag raised into place. The public property was delivered to and accepted by the representative of the United States.

Prior to the signing of the resolution of annexation the Republic of Hawaii had been an independent sovereignty. She had long occupied a picturesque position among the governments of the world. Although annexation was brought about by the mutual efforts and in compliance with the desire of both governments when annexation became an accomplished fact, the Republic of Hawaii passed into history; there was no "union" or "marriage" as has been claimed, there was absorption—annihilation. In the language of the resolution "the Hawaiian Islands and their dependencies" were "annexed as a part of the territory of the United States," and at once became "subject to the sovereign dominion thereof."

The Joint Resolution further provided "until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned."

Chief Justice Taney says on the subject of newly acquired territory: "There is certainly no power given by the constitution to the federal government to establish, or maintain, colonies, bordering on the United States, or at a distance, to be ruled and governed at its own pleasure."

"The power to expand the territory of the United States by the admission of new states is plainly given, and, in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to be admitted.

It is acquired to become a state, and not to be held as a colony, and governed by Congress with absolute authority.

A power therefore in the general government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. * * * *It cannot create for itself a new character, separate from the citizens of the United States, and the duties it owes them under the constitution. The territory being a part of the United States, the government and the citizens both enter it under the constitution*, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property beyond what that instruments confers, *nor lawfully deny any right which it has reserved.* * * * *It could confer no power on any local government established by its authority to violate the provisions of the constitution.*" *Scott v. Sandford*, 19 How. U. S. 450-1-2-3.

"It cannot be admitted that the King of Spain (said Justice Daniels) could by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive, or power to exercise them.

"*Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government*, and not according to those of the government ceding it." *Pallod's Lessees v. Hagan*, 3 How. 225.

In the license cases, 5 How. 613, Mr. Justice Daniel again said "Laws of the United States," in order to be binding, must be within the legislative powers vested by the constitution.

Treaties to be valid must be within the scope of the same powers for there can be no "authority of the United States" save what is derived mediately, or immediately, and regularly and legitimately from the constitution."

Chief Justice Marshall, speaking for the Supreme Court of the United States relative to the territory of Florida acquired by the United States by treaty from the King of Spain, said on the subject of the status of territory ceded by treaty: "The constitution confers absolutely on the government of the Union the powers of making war and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. *If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed either on terms stipulated in the treaty of cession, or on such as its new master shall impose.*" *Am. Ins. Co. et. al. v. Canter*, 1 Pet. 542.

There was no "conquest" by force in the annexation of the Hawaiian Islands, nor "holding as conquered territory," they came to the United States in the same way that Florida did, to-wit, by voluntary cession, and the rule for determining their status is the same. The Hawaiian Islands became a part of the United States on the terms set forth in the Joint Resolution and on such terms "as its new master might impose;" not one or two years after the Resolution was in force and effect, *but at once,—immediately.*

The Resolution of annexation further provided that "the municipal legislation of the Hawaiian Islands * * * not inconsistent with the Joint Resolution, nor contrary to the Constitution of the United States shall remain in force until the Congress of the United States shall otherwise determine."

It seems clear from the authorities cited that the Hawaiian Islands were a part of the territory of the United States on the 16th day of August, 1898, as much so as the State of Indiana or the Territory of New Mexico.

Was the Constitution of the United States in force here then, or the 5th and 6th amendments, as claimed for the petitioner?

These amendments are as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or prosperity, without due process of law; nor shall private property be taken for public use without just compensation." 5th Amend. U. S. Const.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed (which district shall have been previously ascertained by law) and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor: and to have the assistance of counsel for his defence." 6th. Amend. U. S. Const.

The government of the United States is one of delegated powers. The American nation, or, in the language of the constitution, "the people of the United States," is absolutely sovereign. This sovereign has prescribed certain fundamental rules, contained in the constitution of the United States, which its servants, the President and each member of Congress, must take a solemn oath to support and defend as a condition precedent to taking office. These servants are nowhere authorized to exercise absolute sovereignty but their powers are limited by the very terms of the constitution under which they hold their respective offices and discharge their official duties.

Mr. Justice McLean, speaking for the Supreme Court of the United States, said:

"The federal government is one of delegated powers. All powers not delegated to it, or inhibited by it to the states are reserved to the states, or to the people." *Briscoe v. Bank*, 11 Pet. 317.

Chief Justice Marshall said: "The Government, then, of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 326.

Early in the constitutional history of the United States, (1820), Chief Justice Marshall, again speaking for the unanimous court on the question as to whether or not the provisions of the constitution extended to the District of Columbia, said as to the meaning of the term "United States":

"Does this term designate the whole or any particular part of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and exercises should be observed in the one than in the other." *Loughborough v. Blake*, 5 Wheat. 317.

This opinion has stood as the decision of the highest court in the land for eighty years.

"Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state acquired the means of self government may result from the fact, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whatever may be the source, whence the power is derived, the possession of it is unquestioned." *Am. Ins. Co. v. Canter*, 1 Pet. 542.

Again in the same opinion the Chief Justice says: "In legislating for them, Congress exercises the combined powers of the general and of a state government." 1 Pet. 540.

Chief Justice Waite says in *First Nat. Bank v. Yankton*, 101 U. S. 129: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States.

Congress is supreme, and, for the purpose of this department of its governmental authority, has all of the powers of the people of the United States except such as have been expressly or by implication *reserved in the prohibitions of the constitution.*

It may do for the territories what the people under the constitution may do for the states."

Mr. Justice Curtis in his dissenting opinion in the Dred Scott case, says, on this subject: "If, then, this clause does contain a power to legislate respecting the territory, what are the limits of the power? To this I answer that in common with all other legislative power of Congress, *it finds limits in the express prohibitions on Congress, not to do certain things*; that in the exercise of the legislative power Congress cannot pass an *ex post facto* law or bill of attainder and so in respect to each of the *other prohibitions contained in the constitution.*" 19 How. 614-15.

"The novel doctrine," says Lochren, U. S. District Judge for Dist. of Minn., "that the power of Congress to govern territory ceded to the United States may be conferred by a foreign sovereign, by and through the terms of a treaty of cession, and that the general government can exercise powers thus granted by a foreign sovereign, independent of and in disregard of the constitution, until Congress, mayhap, in the future, shall by its enactment, see fit to extend the constitution over the territory, is contrary to the holding of the Supreme Court of the United States above cited, to the effect that the general government is one of enumerated powers, and can claim and exercise no power not granted to it by the constitution, either expressly or by necessary implication.

It is clear that the general government cannot legislate over territory where the constitution from which its every power is derived does not extend. The constitution must be in force over *territory before the general government can have any authority to legislate respecting it. No foreign sovereign can invest the general government with any legislative power.*

"The plain, obvious and undeniable fact is that the general